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The world cleansing of product names

In a classic comedy skit from the first season of "Saturday Night Live" in 1975, Chevy Chase and Richard Pryor portrayed a potential employer and job seeker in what can only be described as the job interview from hell.

Chase's proffered word associations degenerated from "tree"/"dog" to "colored"/"redneck." Pryor's anger mounted until Chase's use of the N-word was met by Pryor's heated response: "Dead honkie." Hailed as an edgy racial satire, the exchange failed to make the 40th anniversary show. Political correctness would not allow its rebroadcast.

Political correctness is not just an issue for politicians or mass entertainment. Over the past several months there have been various unrelated developments that signal a growing international trend toward subjecting even the names applied to marketed goods and services to a correctness cleansing that may leave some names out in the cold.

Name cleansing is not a new phenomenon. To the contrary, as a result of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS, new entrants into the wine and spirits market found themselves barred from using geographic descriptors (referred to as geographic indications, or GIs) such as Champagne in the United States. Instead, it became "sparkling wine."

Yet recent developments suggest we may be in for more changes in the future — and across a broader array of goods.

In May, 28 member countries of the Lisbon Agreement for the Protection of Appellations of Origin established an updated version. The Lisbon Agreement, similar to TRIPS, requires protection for GIs (referred to as appellations of origin, or AOs).

Unlike TRIPS, however, the Lisbon Agreement provided that AOs be protected regardless of their generic nature in the

country of use. Thus, under TRIPS, the United States can decline to protect GIs such as "Chablis" and "Pilsner" due to their generic meanings.

Under the Lisbon Agreement, so long as these GIs retain their geographic source significance in their country of origin, they must be protected.

Until recently, the strong protections afforded AOs under the Lisbon Agreement did not greatly affect U.S. producers because of the relatively narrow scope of covered GIs. Only GIs that indicate a "quality and characteristics ... due exclusively or essentially to the geographical environment [of the originating country], including natural or human factors" are protected (Article 2.1). Thus, agricultural products, such as wine, cheese and beer, are covered. Electronics arguably are not.

The updated Lisbon Agreement (dubbed the Geneva Act) now covers all GIs. The United States has already stated it has no intention of signing the Geneva Act. But many cheeses, chocolates, beers, wines and spirits produced in the United States may have to change their names to continue to be sold in foreign countries. Such well-known terms as "Pilsner," "cheddar," "Champagne," "feta" and "Parma" are among the most prominent names that may be sacrificed.

Similar cleansing for generic designations for pharmaceuticals (referred to as International Nonproprietary Names, or INNs) may be on the horizon.

INNs are basically generic drug designations established by the World Health Organization. They allow health care practitioners to identify and prescribe chemically identical drugs (generics). Recent efforts to establish similar naming protocols for biosimilars, such as Zarxio for Neupogen (filgrastim), have raised a firestorm of protests.

Branded producers insist that



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every biologic should be given its own unique name. Generic drug manufacturers, by contrast, insist that such unique names will reduce the market for biosimilars by giving health care practitioners the mistaken idea that biosimilars have a different clinical effect from their related biologic.

The pressure for greater adoption of INNs has increased as a result of a demand by countries such as India that INNs be referenced in pending patent applications. Such use would arguably reduce patent search costs, ultimately increasing the access to patented technologies and increasing the development of generic drugs. There are fears, however, that the pressure for more INNs may result in the "genericide" of trademarks associated with innovative pharmaceuticals.

The World Intellectual Property Organization's Patent Standing Committee is expected to address the issue at its upcoming meeting in Geneva in December.

The elimination of scandalous brands from the commercial vocabulary has been a constant

feature of the global commercial economy. The cancellation by the U.S. Patent and Trademark Office of Washington Redskins registrations because they were "disparaging" to Native Americans is the most prominent example of this ongoing international phenomenon.

Despite the effect of political correctness on international commercial speech, there are signs of a small, but potential, countertrend.

An Asian rock band, The Slants, specifically adopted its name in an effort to take back a disparaging term and give it new meaning. Similar to the fate of the Washington Redskins marks, The Slants mark was denied registration due to its "disparaging" nature.

What makes the *In re Tam* case significant is that the adoption of "The Slants" mark represents a concerted effort by members of a disparaged group to remove the stigma of such terms.

Such efforts to imbue offensive terms with new meanings have been successful in the past. Notably, the mark Dykes on Bikes for education and entertainment services survived a registration challenge for disparagement in 2006.

Nevertheless, the U.S. Court of Appeals for the Federal Circuit originally rejected The Slants' efforts to register their mark. However, the court on its own accord in April vacated this decision specifically to consider the free speech implications of such registration refusals.

In "Romeo and Juliet," Shakespeare declared: "That which we call a rose by any other name would smell as sweet." I am not sure that rule applies to commercial speech because, to paraphrase Polonius in "Hamlet": "A man's good name once lost is lost for good."

There are strong reasons to remove or regulate commercial speech. Political correctness is not one of them.